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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO ZAZUETTA GONZALES, Defendant and Appellant.	G055328 (Super. Ct. No. 17CF0616) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed in part and remanded with directions.

Lizabeth Weis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Fernando Zazuetta Gonzales was convicted of kidnapping for robbery (Pen. Code, § 209, subd. (b)),[1] various related crimes, and numerous enhancements, including four prior serious felonies, two of which were strikes (§ 667, subds. (a), (d), (e)(2)). On appeal, he argues there was insufficient evidence of kidnapping. He also contends the evidence was insufficient to prove he was the person who had committed the strike priors, the sentence was ambiguous, and that he is entitled to resentencing based on a change in the law allowing trial courts to exercise their discretion to strike the enhancements at issue here. We find that only his last argument has any merit, and accordingly, we remand for resentencing on that issue, and affirm the judgment in all other respects.

I

FACTS

The location where this crime occurred had several video-only cameras, and the following statement of facts is drawn both from the testimony of the victim and the video footage.

One evening in March 2017, defendant walked into a Santa Ana beauty salon. He was wearing a baseball cap backwards and a hooded sweatshirt. The video footage from outside the salon showed the defendant walking by and looking through the open door approximately seven minutes before he entered. Just before he entered, he walked past the salon again and looked through the open door before turning around and walking into the salon.

A stylist, alone in the salon, was standing at a desk toward the back of the shop. She was counting cash.

[1] Subsequent statutory references are to the Penal Code.

At first, defendant told the stylist he wanted a haircut, then he told her it was a "holdup." The defendant can be seen taking a small, dark object out of his pant pocket and holding it close to his chest with his right hand.

The stylist responded "'help me,'" and defendant, moving to her side of the desk, hit her above the eyebrow with the object hard enough to cause bleeding. She was then pushed and dragged into a back room. She resisted because the defendant said he was going to kill her, and she did not want to go to the back room.

The back room only had partial camera coverage, but defendant can be seen with his hands on the stylist and pointing something at her. She attempted to resist, but was pushed to the floor at least twice, and pushed into the wall. He demanded money from her, hit her, and prevented her from getting up or leaving.

Defendant left the back area about a minute later, and the stylist followed as defendant ran out of the store. He took the stylist's iPhone while leaving the cash behind. The entry camera shows defendant going in one direction and the stylist going in the other, gesturing to someone and pointing in defendant's direction before returning to the salon.

Police responded approximately 11 minutes later. The stylist told them about the incident, stating that the defendant had a handgun and had hit her in the face with it before dragging her into the back room, where he threw her to the ground, demanded money, and threatened to kill her. She also described the defendant was pulling the slide back on the weapon as if he were chambering a round. She was able to give police a good physical description of defendant.

The police reviewed the video and tracked the iPhone to a nearby plaza, where they recognized defendant from the surveillance video. They found a hat and a pellet gun among his belongings. The police arranged for a field identification by the stylist, and she identified him.

Defendant was charged with kidnapping to commit robbery while personally using a deadly weapon (§§ 209, subd. (b), 12022, subd. (b); count one), robbery while personally using a deadly weapon (§§ 211, 212.5, subd. (c), 12022, subd. (b); count two), assault with a deadly weapon (§ 245, subd. (a); count three), criminal threats (§ 422, subd. (a); count four), and aggravated false imprisonment while personally using a knife (§§ 236, 237, subd. (a), 12022, subd. (b); count five). Defendant was further alleged to have committed five prior serious felonies, two of which were strikes (§ 667, subds. (a), (d), (e)(2)).

Count five, aggravated false imprisonment, was later dismissed pursuant to the prosecution's motion at the close of its case. Defendant moved for an acquittal as to the kidnap for robbery charge, and the court denied the motion.

Defendant was found guilty as charged of kidnapping to commit robbery, robbery, and assault with a deadly weapon (counts one through three), and attempted threats as a lesser offense to the criminal threats charge (count four). The jury found the weapon enhancements true on counts one through three. In a bifurcated proceeding, the court found insufficient evidence regarding one prior conviction, and found it true that defendant had one prior strike and four serious felonies.

The court sentenced defendant to life in prison, with the minimum parole eligibility of 14 years, on count one. It also imposed five years for each of the four priors, and one year for the weapon use. Sentence on counts two through four was stayed pursuant to section 654. Thus, "[t]he abstract of judgment reflects an indeterminate sentence of life plus one year, and a determinate sentence of 20 years." Defendant now appeals.

II

DISCUSSION

A. Kidnap for Robbery

Defendant's first claim is that the trial court erred by not granting his motion for acquittal (§ 1118.1) on count one, kidnap for robbery. "In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, '"whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." [Citations.]' [Citation.] 'Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.)

Section 209, subdivision (b)(1), states, in relevant part: "Any person who kidnaps or carries away any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." Subdivsion (b)(2) specifies the asportation element: "This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." This statute largely codified a rule set forth in *People v. Daniels* (1969) 71 Cal.2d 1119 (*Daniels*), but in 1997, it was amended to require an increased risk of harm instead of a "*substantially*" increased risk. (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1471.)

"The *Daniels* test is considered a two-part test. First, '"[i]n determining 'whether the movement is merely incidental to the [underlying] crime . . . the jury considers the "scope and nature" of the movement. [Citation.] This includes the actual distance a victim is moved. However, . . . there is no minimum number of feet a

defendant must move a victim in order to satisfy the first prong.' [Citations.]" [Citations.]' [Citation.] 'Incidental' means 'that the asportation play no significant or substantial part in the planned [offense], or that it be a more or less "'trivial change[] of location having no bearing on the evil at hand.'"' [Citation.] '"'The second prong of the *Daniels* test refers to whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in [the underlying crime]. [Citations.] This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased. [Citations.]' [Citations.]" [Citation.]' [Citation.] The two elements of the test are related; 'whether the victim's forced movement was merely incidental to the [underlying offense] is necessarily connected to whether it substantially increased the risk to the victim.' [Citation.] '[E]ach case must be considered in the context of the totality of its circumstances.'" (*People v. James* (2007) 148 Cal.App.4th 446, 454.)

Was moving the victim to the back room merely incidental in this case? The distance was certainly not far, but this is not determinative. The finder of fact must consider "the 'scope and nature' of the movement," as well as the distance. (*People v. Vines* (2011) 51 Cal.4th 830, 870, overruled on other grounds in *People v. Hardy* (2018) 5 Cal.5th 56, 104.) The movement must be "substantial" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152), and more than the distance necessary to help accomplish the robbery (*People v. Washington* (2005) 127 Cal.App.4th 290, 301 [moving employees from public area of bank to vault incidental to accomplishing robbery]).

Although defendant argues otherwise, the evidence at the time of the motion for acquittal demonstrated that no movement of the victim whatsoever was necessary to accomplish the robbery. There was money sitting on the desk, which defendant did not ultimately steal, and a iPhone, which he did. There was simply no

reason to move the victim other than to remove her from the sight of the door and sidewalk, as we shall discuss in a moment. The movement was unnecessary and excessive.

As for the second, interrelated prong, the increased risk of harm, there is no serious debate on this point. The salon's door was open before the robbery and left open by defendant when he entered. There was a clear view from the street to the desk where the victim was standing. Dragging the victim to the back room substantially decreased her chance of help or escape. Defendant's opportunity to harm the victim and commit additional crimes, however, substantially increased, as did the potential psychological harm to the victim. Based on this evidence, we conclude there was no error in permitting the kidnap for robbery count to be decided by the jury.

B. Sufficient Evidence of Priors

Defendant next argues there was insufficient evidence he was the same person who had been convicted of the crimes used to enhance his sentence. This contention is based primarily on the lack of booking photographs and fingerprints.

The prosecution introduced a certified copy of defendant's rap sheet, arguing that the records of prior convictions belonged to defendant because there was a match of physical description (including tattoos), date of birth, and social security number. At the court's request, the prosecution also produced a copy of a DMV photograph linked to defendant's driver's license number. Defense counsel argued the photograph was not certified by the DMV, but the court overruled the objection, finding that such photographs were "routinely admitted by courts as an official document." The court found the photograph was that of the defendant, who was present in court.

In the trial court, the defendant's identity as the person with the prior conviction must be proved beyond a reasonable doubt. (§ 1025, subd. (c).) On appeal,

we review the trial court's determination for substantial evidence. (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1190 (*Saez*).)

Under the substantial evidence standard, the evidence presented was sufficient to establish defendant's identity. Establishing prior convictions through certified documents is permissible. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066.) In *Saez*, the court rejected an insufficient proof of identity argument based on records which established the defendant had the same name and birthdate and had lived on the same street as the individual who suffered prior convictions. The court found the defense's argument that two people with the same name could have lived on the same street entirely unpersuasive. (*Saez*, *supra*, 237 Cal.App.4th at p. 1190.)

"'[I]n the absence of countervailing evidence, . . . identity of person may be presumed, or inferred, from identity of name.' [Citation.] The identity of birth dates is also highly significant. [Citation.] And, although the house numbers of the addresses on East Garfield Street varied, we agree with the trial court that coincidence is not a reasonable explanation for the identical names, birth dates, and streets." (*Saez*, *supra*, 237 Cal.App.4th at p. 1190.) The court found that fingerprints and photographs were not required. (*Id*. at p. 1191.)

Defendant cites to two cases from the 1960's that used the combination of records of conviction and proofs of identity such as fingerprints and photographs to conclude the burden of proof was met. (*People v. Hill* (1967) 67 Cal.2d 105, 121-122; *People v. Manfredo* (1962) 210 Cal.App.2d 474, 478-479.) But neither of these cases stand for the proposition that such evidence must be part of the record of conviction. Identity must be established by the evidence, but the law does not stop the court from using other methods if fingerprints and photographs are not part of the available records. Indeed, courts have consistently rejected such arguments. (*Saez*, *supra*, 237 Cal.App.4th at pp. 1190-1191; *People v. Sarnblad* (1972) 26 Cal.App.3d 801, 805-806.)

Here, the court used other information available to it – specifically, the DMV photograph, in the court's words, as the "link between the documents and the person in court here." The name, photograph, physical appearance, and date of birth on the defendant's attached DMV record matched the certified copy of the rap sheet. This was sufficient to meet the requisite burden of proof.

C. Ambiguity in Sentence

Defendant next argues there is an ambiguity in the sentence the court imposed: "The trial court imposed the statutory term of life with the possibility of parole for count one, kidnap for robbery . . . . However, the court also ordered that the life term would be doubled as a consequence of Gonzales's strike prior for robbery . . . , and that his earliest parole eligibility would be after serving a minimum of 14 years . . . . The order, as pronounced, and as entered into the minutes and the abstract of judgment, is unclear. The life term itself is not to be doubled, however the minimum parole term is 14 years pursuant to his strike prior. . . . [T]he sentence must be modified to reflect a life sentence, and . . . service of a minimum of 14 years before parole eligibility." (Record references and fn. omitted.)

The record reflects that the court stated the following as to count one: "The sentence on Count 1 will be tentatively doubled. Therefore, the minimum term the defendant must serve before becoming eligible for release on parole is 14 years pursuant to Penal Code section 3046." The court emphasized that the "total tentative indeterminate sentence is life with the possibility of parole doubled plus 21 years." The court then tentatively set forth the remaining sentence before inviting objections. There were none.

The court then stated it would "sentence the defendant to the term as previously indicated: To an indeterminate term of life with the possibility of parole, doubled, plus 21 years in the state prison on Count 1, under the terms and for the reasons

and findings previously articulated." The abstract of judgment reflects an indeterminate sentence of life plus one year, and a determinate sentence of 20 years for the four prior convictions.

There does not seem to be any substantive difference, just a disagreement as to whether the sentence was sufficiently clear. We find no issue with clarity, but as we are ordering resentencing in any event (see *post*), we note the parties should raise any concerns about clarity at sentencing rather than on appeal.

D. Resentencing Under New Legislation

As discussed above, defendant's sentence in this case includes four five-year prior serious felony enhancements pursuant to section 667, subdivision (a)(1). At the time of defendant's sentencing, the trial court had no power to strike or dismiss the five-year serious felony priors. Defendant filed a supplemental brief arguing he is entitled to the benefit of Senate Bill No. 1393. That legislation, which became effective January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, § 1.)

The Attorney General concedes[2] the rule of retroactivity in *In re Estrada* (1965) 63 Cal.2d 740, applies to Senate Bill No. 1393. But the prosecution argues that remand is not needed in this case because the trial court previously indicated it would not dismiss the enhancements even if it had the discretion to do so. There is authority from another district suggesting that such a remand is not strictly required when the court indicated what it would do if it had the discretion to strike priors during sentencing. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

[2] The Attorney General also argued that if we decided this case prior to January 2019, the new legislation would not yet be effective. That is no longer a concern.

While it is true that the court made such a statement here, commenting on the issue in the abstract and having the actual power to exercise that discretion are two entirely different matters. Given the facts of this case and defendant's lengthy sentence, we find the most prudent course of action is to permit defense counsel to have an opportunity to make an argument on this point in the trial court. Accordingly, we remand for that purpose.

III

DISPOSITION

The matter is remanded to the trial court with directions to exercise its discretion whether to strike the four five-year prior serious felony enhancements pursuant to sections 667, subdivision (a) and 1385, subdivision (b). In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.